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January 25, 2018

The Honorable Grant F. Langley
City Attorney
City Hall
200 E Wells Street, Room 800
Milwaukee, WI 53202

Ms. Patricia A. Fricker
Assistant City Attorney
City Hall
200 E Wells Street, Room 800
Milwaukee, WI 53202

Re: Claim of Dan and Jill Stilwell for Property Damage
Judiciary and Legislation Committee Matter No. 171450
C.I. File No. 1061-2017-2278

Dear Mr. Langley and Ms. Fricker:

We are writing regarding the above-referenced claim. Our claim seeks compensation for damages caused to our boat (hereinafter, "Wanderer") when the City's fireboat (hereinafter, "Trident"), struck and damaged Wanderer. The facts surrounding our claim are set forth in our letter, dated November 6, 2017, to the Milwaukee City Clerk.

We understand that you have reviewed our claim and, without citing any legal authority to support your position, recommended to the Common Council that the claim be denied under the theory that the negligent actions of Trident's helmsman and crew must be excused because the fireboat "was forced to take evasive action" to avoid a collision with another boat.[1] For the following reasons, we respectfully disagree with your legal theory and respectfully request that you reconsider your recommendation.

Applicable Law

General Principles of Admiralty Law

Our claim sounds in admiralty and is governed by the general maritime law of the United States.[2] *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Co.*, 513 U.S. 527 (1995) (admiralty

[1] Letter, dated January 2, 2018, from the City Attorney's Office to the Common Council regarding this claim.

[2] The United States Constitution confers upon the federal courts subject matter jurisdiction over admiralty and maritime claims. U.S. Const. art. III, § 2, cl. 1. State courts have concurrent jurisdiction over certain admiralty matters under the so-called "saving to suitor's" clause in 28 U.S.C. § 1333.

jurisdiction extends to claims related to flooding in the downtown Chicago Loop after operators of a crane sitting on a barge in the Chicago River drove piles into the riverbed above an underwater tunnel, allegedly weakening the tunnel and causing the flooding); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982) (admiralty jurisdiction applies where two pleasure boats collided on the Amite River in Louisiana); *Sisson v. Ruby*, 497 U.S. 358 (1990) (admiralty jurisdiction extends to claims arising after a defective washer/dryer caught fire on a pleasure boat docked at a marina, with the resulting fire burning the pleasure boat and the marina itself); *In re Germain*, 824 F.3d 258 (2d Cir. 2016) (admiralty jurisdiction extends to claims arising from injuries suffered by a person diving from a pleasure boat into Lake Oneida).

Admiralty law protects "the important national interest in uniformity of the law and remedies for those facing the hazards of waterborne transportation." *Foremost*, 457 U.S. at 667. "With admiralty jurisdiction comes the application of substantive admiralty law. Absent a relevant statute, the general maritime law, as developed by the judiciary, applies." *E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864 (1986).

The general maritime law imposes a duty of care on vessel owners and operators to operate their vessels under the "rule of good seamanship" and in a safe and seaworthy manner. *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law* 760-64 (5th ed. rev. 2012). In applying this duty of care, general maritime law draws a clear distinction between "collisions" and "allisions." *See* 1 Benedict on Admiralty § 9.02 (7th ed. rev. 2016). A collision occurs when two moving vessels come in contact with each other, whereas, an allision occurs when a moving vessel strikes a stationary object such as a docked vessel, bridge or wharf. *Id*. The distinction is important because of the presumption of fault that arises in allision cases.

When a moving vessel allides with a stationary object, the moving vessel is presumed to be at fault. *The Oregon*, 158 U.S. 186, 197, 15 S.Ct. 804, 809, 39 L.Ed 943 (1895). This presumption has come to be known as the Oregon Rule. As explained by the U.S. District Court for the Northern District of California[3]:

> "In fixing fault in allisions, admiralty courts are guided by a common sense presumption. The vessel underway and making her passage is responsible for her actions and will be presumptively at fault when she strikes a stationary object. *Wardell v. Department of Transp., Nat. Trans. Safety Bd.,* 884 F.2d 510, 512 (9th Cir. 1989); *Maxwell v. Hapag-Lloyd Aktiengesellschaft,* 862 F.2d 767, 769 (9th Cir. 1988); *see The Louisiana,* 70 U.S. 164, 173 (1865); *Weyerhaeuser Co. v. Atropos Island,* 777 F.2d 1344, 1347 (9th Cir. 1985); *The President Madison,* 91 F.2d 835, 837 (9th Cir. 1937).
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> "This presumption derives from the common sense observation that moving vessels do not usually collide with stationary objects unless the vessel is mishandled in some way." *Wardell,* 884 F.2d at 512.

[3] *Sacramento-Yolo Port Dist. v. M/V Ulla*, 1992 U.S. Dist. LEXIS 16063, *16-17 (D. Cal. 1992).

The Oregon Rule shifts "both the burden of producing rebuttal evidence and the burden of persuasion to the moving vessel." Schoenbaum at 777, *citing Weyerhaeuser Co. v. Atropos Island*, 777 F2d 1344 (9th Cir. 1985); *James v. River Parishes Co., Inc.*, 686 F2d 1129, 1132 (5th Cir. 1982).

Although the presumption of fault under the Oregon Rule is rebuttable, "The presumption is universally described as 'strong' . . . and as one that places a 'heavy burden' on the moving ship to overcome." *Sacramento-Yolo Port Dist. v. M/V Ulla*, 1992 U.S. Dist. LEXIS 16063, *16-17 (D. Cal. 1992); quoting *Wardell,* 884 F.2d at 512.

Applicable Inland Rules of Navigation

The Inland Navigation Rules[4] govern the navigation of vessels on the inland waters of the United States, including Lake Michigan. 33 U.S.C. § 2001. Among other things, the Inland Navigation Rules mandate that all vessels:

- Maintain a proper look-out by sight and by hearing as well as by all other available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.[5] 33 U.S.C. § 2005.

- Proceed at a safe speed so that the vessel can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions. 33 U.S.C. § 2006.

- Use all available means appropriate to the prevailing circumstances and conditions to determine if a risk of collision exists, and properly use radar equipment if fitted and operational, including long-range scanning to obtain early warning of any risk of collision. 33 U.S.C. § 2007.

- Take actions to avoid collision in ample time and with due regard to the observance of good seamanship. 33 U.S.C. § 2008.

Application of the Law to Our Claim

Trident's helmsman committed a comedy of errors leading up to the allision with Wanderer, culminating in his failure to observe good seamanship in attempting to avoid a collision with an unidentified sailboat. Many of the helmsman's actions violated the Inland Navigation Rules.

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[4] The Inland Navigation Rules are set forth in the Inland Navigational Rules Act of 1980, as amended. Public Law 96-591, codified at 33 U.S.C. § 2201, et seq.

[5] "The duty to maintain a proper lookout is perhaps the first rule of safe navigation . . . ." *Hosei Kaiun Shoji Co. v. The Seaspan Monarch*, 1981 AMC 2162, 2179 (D. Or. 1980).

- Trident obviously failed to maintain a proper look-out in violation of Rule 5. The fact that the helmsman and crew did not notice the sailboat until they came alongside Wanderer speaks volumes, particularly because the sailboat's mast rises more than an estimated 35' above the water.[6] Moreover, the sailboat approached Trident on Trident's starboard side.[7] (*See Figure 1* in the attached Exhibit A.) Consequently, under Rules 15(a) and 16 of the Inland Navigation Rules, Trident was the "give-way vessel" under the circumstances and was obligated to keep out of the way and avoid crossing ahead of the sailboat.[8] A prudent mariner would have been particularly vigilant in watching for other vessels, particularly those, such as the sailboat, approaching from his starboard side.[9] With a proper look-out, Trident's helmsman would have seen the sailboat well in advance of Trident's approach to Wanderer and would have had ample time to adjust Trident's course to avoid any possibility of an allision with Wanderer.

- Trident also violated Rule 6 by failing to proceed at a safe speed because Trident was clearly unable to "take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions." 33 U.S.C. § 2006.

- Trident failed to use all available means to determine if a risk of collision existed in violation of Rule 7. We believe that Trident's helmsman and crew either failed to turn Trident's radar on, failed to properly tune the radar, or failed to make proper use of the radar. As a result, Trident failed to obtain early warning of the possible collision between Trident and the sailboat.

- In an effort to avoid collision with the sailboat, Trident failed to observe good seamanship, resulting in the allision with Wanderer, in violation of Rule 8.

- Finally, and perhaps most importantly, Trident was also clearly negligent in passing unreasonably close to Wanderer. Had the helmsman been operating Trident under the

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6 We suspect that the spectacle of the operating water cannons and the festivities of the Parade may have played a large part in distracting the helmsman.

7 The sailboat was motoring at the time with its sails down. Consequently, for purposes of the Inland Navigation Rules, it constituted a "power-driven vessel." 33 U.S.C. § 3(b) and (c).

8 Rule 15(a) mandates that "When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel." 33 U.S.C. §§ 2015(a). Rule 16 (entitled "Action by Give-way Vessel") mandates that "Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear." 33 U.S.C. § 2016.

9 Even if Trident had been the stand-on vessel in these circumstances, which it was not, "The fundamental rule of admiralty is that a vigilant lookout must be kept on all vessels, so that collision may be prevented even with those which are violating the rules." *Delaware L. & W. R. Co. v. Central R. Co. of New Jersey*, 238 F 657, 660 (2d Cir. 1916).

> "rules of good seamanship" and in a safe and seaworthy manner, he would not have placed Trident in a position such that it could avoid a collision with one vessel only by alliding with another vessel.

The Helmsman's Errors Are Not Excusable Under General Maritime Law

We respectfully disagree with the notion that the actions of Trident's helmsman are excusable under general maritime law. Although general maritime law does, in very rare instances, excuse a helmsman's errors when his vessel is deemed to be *in extremis*[10], it does so only when the helmsman's errors occurred because of a sudden emergency not of the helmsman's making. Admiralty courts do not:

> ". . . excuse a vessel making a wrong maneuver *in extremis* where the imminence of the peril was occasioned by the fault or negligence of those in charge of the vessel, or might have been avoided by earlier precautions which it was bound to take." 70 Am.Jur.2d Shipping § 619 (2003).

As the Court in *Patterson Oil Terminals* stated in deciding an allision case, applying the Oregon Rule and rejecting the *in extremis* defense:

> "Such [allision] accidents simply do not occur in the ordinary course of things unless the vessel has been mismanaged in some way. It is not sufficient for the respondent to produce witnesses who testify that as soon as the danger became apparent everything possible was done to avoid an accident. The question remains, how then did the collision occur? The answer must be that, in spite of the testimony of the witnesses, what was done was too little or too late or, if not, then the vessel was at fault for being in a position in which an unavoidable collision would occur.
>
> "The only escape from the logic of the rule and the only way in which the respondent can meet the burden is by proof of the intervention of some occurrence which could not have been foreseen or guarded against by the ordinary exertion of human skill and prudence - not necessarily an act of God, but at least an unforeseeable and uncontrollable event." *Patterson Oil Terminals, Inc. v. The Port Covington*, 109 F.Supp. 953, 954 (E.D. Pa. 1952), *aff'd*, 208 F.2d 694 (3d Cir. 1953).

The presence of other moving vessels in a crowded marina, particularly on the night of a parade, is clearly <u>not</u> one of those "unforeseeable and uncontrollable" events.

As discussed above, any imminent collision with the sailboat could easily have been avoided had the City, operating through Trident's helmsman and crew, operated Trident under the "rule of

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[10] The term "*in extremis*" is a Latin phrase which literally means "at the point of death." In recent times, it has come to mean "in extreme circumstances." *Webster's New Collegiate Dictionary* (1981).

good seamanship," in a safe and seaworthy manner and in compliance with the Inland Rules of Navigation.

Conclusion

For the reasons stated above, the City is clearly liable for the damages caused to Wanderer. Accordingly, we respectfully request that you reconsider your recommendation to the Common Council and we request that the Common Council honor our claim and approve it for payment.

Sincerely,

Dan Stilwell

DDS/
enclosure

cc: Alderman Mark A. Borkowski, Chair of the Judiciary & Legislation Committee of the Milwaukee Common Council
Alderman Cavalier Johnson, Vice-Chair
Alderman Robert J. Bauman, Member
Alderman Jose G. Perez, Member
Alderman Terry L. Witkowski, Member

EXHIBIT A

Figure 1 (Not to Scale)